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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 449

NEWARK FIRE INSURANCE COMPANY,
Prosecutor-Appellant,

vs.

STATE BOARD OF TAX APPEALS AND THE CITY OF NEWARK, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY,
Defendants-Respondents.

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT.

Petitioner contends that the basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals of the State of New Jersey is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 344 (a), pp. 205, 206 (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937):

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

and in Title 28, U. S. Code, Sections 861 (a) and 861 (b) Act of January 31, 1928, c. 14, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466:

"861 (a). Writ of error abolished; substitution of appeal. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

"861 (b). Statutes governing writs of error to apply to appeals. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

2. The statute of the State of New Jersey, the validity of which is here involved, is Chapter 236 of the Laws of 1918, Section 202, p. 848:

"All property, real and personal, within the jurisdiction of this State, not expressly exempted by this act or excluded from its operation, shall be subject to taxa-

tion annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal property shall be personally liable for the taxes thereon."

Chapter 236 of the Laws of 1918, Section 301, p. 853, as amended by Chapter 310 of the Laws of 1920:

"The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. Personal property in the possession or under the control of any person as trustee, guardian, executor or administrator, shall be assessed in his name, as such, separate from his individual assessment, or in the name of any one of several joint trustees, guardians, executors or administrators, if the one of them having actual control or possession cannot be ascertained by the assessor; but the personal property belonging to the estate of any decedent shall be assessed in the taxing district wherein the decedent resided at the time of his death, except such part of the tangible property thereof as may be actually located in some other taxing district in this State and assessed therein."

Chapter 236 of the Laws of 1918, Section 307, p. 858:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing

district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

These sections were in effect at the time that this tax was levied but have since been revised and are now found in Revised Statutes of New Jersey, Sections 54:4-1, 54:4-9 and 54:4-22:

"54:4-1. Property subject to tax; date of assessment. All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of non-residents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."

54:4-22—same as Section 307 quoted above.

The question raised before the Court of Errors and Appeals and before the Supreme Court and the Tax Boards was the construction and validity of the sections of the stat-

utes quoted on the ground that said statutes as construed and applied were repugnant to the 14th Amendment to the Constitution of the United States, and it is now contended that the judgment and decision of the Court of Errors and Appeals is in favor of the validity of the said sections of the statute as construed and applied, and therefore that judgment and decision may be reviewed by the Supreme Court by appeal.

3. The judgment of the Court of Errors and Appeals of the State of New Jersey here sought to be reviewed was entered on May 31, 1938, and the date upon which the application for the appeal was presented was August 19, 1938.

4. The question involved in this cause is whether the New Jersey tax statutes quoted above, as construed and applied by the courts of that State, imposing a personal property tax upon the intangible personal property of a domestic fire insurance corporation having its business *situs* and commercial domicile in another State, are repugnant to the 14th Amendment of the Constitution of the United States in depriving the appellant of its property without due process of law.

This question was first raised informally before the Essex County Board of Taxation, but that Board rendered no formal opinion thereon other than to affirm the assessment.

Upon appeal to the State Board of Tax Appeals a hearing *de novo* was had. The attorneys of the parties by stipulation (S. C., p. 22) there agreed upon the essential facts. The appellant there urged that only the State of the business *situs* had jurisdiction to tax intangible personal property, but the Board held that the State of the residence of the owner also had jurisdiction to tax. It held (S. C., p. 13):

> "It is apparent that intangible personal property which has acquired a business *situs* in a state other

than that of the owner, may be taxed both in the state where it has acquired a business *situs* and in the state of residence of the owner."

A copy of the opinion of the State Board is attached hereto.

Appellant sought a review of this decision by the Supreme Court of New Jersey by certiorari. On certiorari the appellant assigned as reasons for setting aside the State Board's judgment the error of the State Board in holding that the City of Newark and the State of New Jersey had jurisdiction to tax the intangible personal property of the appellant, where the appellant had its business *situs* in another State (S. C., p. 25).

The Supreme Court of New Jersey considered the question again and in its opinion, reported in 118 N. J. L. 525, a copy of which is attached hereto, held (S. C., p. 35; 118 N. J. L. 526):

"This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

"It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax."

The Supreme Court of New Jersey held that the tax as construed and applied, imposing a personal property tax upon the intangible personal property of a domestic corporation, which corporation and property had a business *situs* in another State, was valid and did not violate the 14th Amendment of the Constitution of the United States by

depriving such corporation of its property without due process of law.

Upon appeal the question was presented and argued to the Court of Errors and Appeals of New Jersey, which after consideration affirmed the judgment of the Supreme Court by a *per curiam* opinion, reported in 120 N. J. L. 224, and a copy of which is attached hereto, adopting the opinion of the Supreme Court.

Before each of the tax boards and each of the appellate courts appellant urged that the taxing statutes quoted above as construed and applied deprived it of its property in violation of the 14th Amendment of the Constitution of the United States and without due process of law. Each of the tax boards and each of the appellate tribunals considered this question and decided it adversely to the appellant. The determination of this question in appellant's favor would have been a holding that there was no jurisdiction to tax and would have been dispositive of the whole case.

Decisions of the Supreme Court of the United States which sustain the jurisdiction of the Supreme Court of the United States to review this cause upon appeal are: *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234; *Safe Deposit and Trust Company of Baltimore* v. *Virginia*, 280 U. S. 83; *Fiske* v. *State of Kansas*, 274 U. S. 380; *Fox River Paper Company* v. *Railroad Commission*, 274 U. S. 651; *Myles Salt Company* v. *Board of Commissioners*, 239 U. S. 478; and *Great Northern Railway Co.* v. *State of Minnesota*, 278 U. S. 503.

The tax boards and the Supreme Court, and the Court of Errors and Appeals relied upon two decisions of this Court, *Cream of Wheat Company* v. *County of Grand Fork*, 253 U. S. 325, and *Union Refrigerator Transit Company* v. *Kentucky*, 199 U. S. 194. These cases support the theory that intangible personal property may be taxed by both the State

of the business *situs* and by the State of the domicile. On this point, however, both cases followed *Blackstone* v. *Miller*, 188 U. S. 189, which was expressly overruled in *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204. The opinion in this last case contained *dicta* suggesting that intangible personal property should be accorded the same immunity against double taxation as tangible personal property.

An attempt was made to raise the question in *First National Bank* v. *Maine*, 284 U. S. 312, but the Court held (284 U. S. 331):

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers' Loan & T. Co. case, supra (280 U. S. 213, L. ed. 375, 65 A. L. R. 1000, 50 St. Ct. 98). That question heretofore has been reserved and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

In *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, this Court held that the intangible personal property of a Delaware corporation was within the taxing jurisdiction of the State of West Virginia where it had its business *situs* or commercial *situs*, and once more found no sufficient reason for saying that intangibles are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.

In *People of the State of New York ex rel Whitney* v. *Graves et al.*, 299 U. S. 366, and in *First Bank Stock Corp.* v. *State of Minnesota*, 301 U. S. 234, this Court has again affirmed that the State of the business *situs* has jurisdiction to tax intangibles.

Under the law as set forth in these cases it is clear that the intangible personal property of the appellant are within the tax jurisdiction of the State of New York where it has its commercial domicile. If intangible personal property is to be accorded the immunity now given to tangible personal property, the conclusion is inescapable that the intangible personal property of this appellant is not within the tax jurisdiction of the State of New Jersey. The failure of the State of New York to exercise its jurisdiction to tax cannot confer jurisdiction upon New Jersey. *Buck* v. *Beach*, 206 U. S. 392; *Commonwealth* v. *West India Oil Company*, 138 Ky. 828 (1910); *Miami Coal Company* v. *Fox*, 203 Ind. 99 (1931); *Smith* v. *Ajax Pipe Line Co.*, 87 F. (2d) 567, certiorari denied 300 U. S. 677.

ARTHUR T. VANDERBILT,
Attorney for Appellant.

Dated August 19, 1938.

EXHIBIT "A".

STATE BOARD OF TAX APPEALS, STATE OF NEW JERSEY.

NEWARK FIRE INSURANCE COMPANY, *Appellant*,

v.

CITY OF NEWARK, *Respondent*.

Opinion.

Filed July 7, 1936.

In the matter of the application for cancellation, and in the alternative, for reduction of a personal property tax upon capital stock and accumulated surplus of Newark Fire Insurance Company, a New Jersey corporation claiming to have a business *situs* in New York.

Appearances:

For Appellant, Arthur T. Vanderbilt, Esq.
For Respondent, Frank A. Boettner, Esq., by John A. Matthews, Esq.

WEAVER, President:

The appellant, Newark Fire Insurance Company, is a corporation organized under the laws of the State of New Jersey, having its registered office at Newark, New Jersey. Its main business and executive office is located in New York City. All books of the company, except those required by law to be kept in this State, are retained in its New York office, where its general accounts are kept. With the exception of a small deposit in New Jersey, all of its cash and securities are in banks located in New York City. For the past six years, the general affairs of the company have been conducted from the New York office, the only business carried on from its registered office in Newark being a local or regional claim and underwriting department.

The Board of Assessors of the City of Newark levied upon the company's capital and accumulated surplus a personal property assessment in the sum of $1,069,000, which assessment was affirmed by the Essex County Board of Taxation on appeal. Appellant seeks to have this assessment cancelled, or in the alternative reduced, upon the following grounds:

1. The business *situs* of the company is in the City of New York.

2. (a) That reserves for unearned premiums, (b) reserves for taxes, and (c) agency balances over 90 days old, should not be included in its capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said items, and that after the deduction of property claimed to be exempt no taxable capital or accumulated surplus remains.

3. That cash on hand or on deposit is exempt and should be deducted from its taxable capital and accumulated surplus.

The company is taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858, which provides:

> "Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

Appellant's claim that it is not taxable in this State because its personal property and business *situs* are located in New York is without merit.

The company is incorporated under the Insurance Companies Act of this State (2 C. S. p. 2839), Section 3 of which provides that its certificate of incorporation shall contain,—

> "The place where the principal office of said company is said to be located and its general business conducted, which shall be within this State, * * * ."

This provision has been carried into the amendment of 1929, —Chapter 6, page 18. The appellant accordingly is required to maintain its principal office and carry on its general business within the State of New Jersey.

Section 305 of the General Tax Act, P. L. 1918, p. 856, provides that:

> "Corporations of this State shall be regarded as residents and inhabitants of the taxing district where their chief office is located, and their personal property shall be taxed the same as that of an individual, except as in this act otherwise provided; * * * ."

In Union Refrigerator Transit Company *v.* Kentucky, 199 U. S. 194, the United States Supreme Court said:

> " * * * there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this court. Tappan *v.* Merchants' National Bank, 19 Wall. 490; Kirtland *v.* Hotchkiss, 100 U. S. 491; Bonaparte *v.* Tax Court, 104 U. S. 592; Sturges *v.* Carter, 114

U. S. 511; Kidd *v.* Alabama, 188 U. S. 730; Blackstone *v.* Miller, 188 U. S. 189.

"If it occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicile or the *situs*."

In the case of Cream of Wheat Company *v.* County of Grand Forks, 253 U. S. p. 325, the United States Supreme Court held that the limitation of the Fourteenth Amendment upon the power of a State to tax the property of its residents which has acquired a permanent *situs* outside of the State does not apply to intangible property, even though it has acquired a business *situs* and is taxable in another State. In that case the Court said:

"The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta *v.* Earle, 13 Pet. 519, 588. The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent *situs* beyond its boundaries. * * * The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile if, like a sea-going vessel, the property has no permanent *situs* anywhere. Southern Pacific Co. *v.* Kentucky, 222 U. S. 63, 68. Nor has it any application to intangible property, Union Refrigerator Transit Co. *v.* Kentucky, *supra*, p. 205; Hawley *v.* Malden, 232 U. S. 1, 11, even though the property is also taxable in another state by virtue of having a 'business *situs*' there. Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 59."

In Maguire *v.* Trefry, Tax Commissioner of Commonwealth of Massachusetts, 253 U. S. 12, 16, the United States Supreme Court said:

> "In Fidelity & Columbia Trust Company *v.* Louisville, 245 U. S. 54, we held that a bank deposit of a resident of Kentucky in the bank of another State, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case Union Refrigerator Transit Co. *v.* Kentucky, *supra*, was distinguished, and the principle was affirmed that the State of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of another State. This is the general rule recognized in the maxim '*bomilia sequuntur personam*,' and justifying, except under exceptional circumstances, the taxation of credits and beneficial interest in property at the domicile of the owner."

In the case of Citizens National Bank of Cincinnati *v.* Burr, 257 U. S. 99, the United States Supreme Court held that a membership in the New York Stock Exchange held by a resident of Ohio was a property right, intangible in its nature, and that whether it was subject to taxation by Ohio taxing laws was a question of State law, determinable by the State Court. In that case the Court said:

> "Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. Kidd *v.* Alabama, 188 U. S. 730, 732; Hawley *v.* Malden, 232 U. S. 1, 13; Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 58."

It is apparent that intangible personal property which has acquired a business *situs* in a State other than that of the owner, may be taxed both in the State where it has acquired a business *situs* and in the State of residence of the owner. The proofs establish that the company pays no per-

sonal property tax in the State of New York, and is now seeking to escape taxation in the State of New Jersey.

The Board concludes that appellant is subject to taxation upon its capital stock and accumulated surplus in the State of New Jersey.

The company's reserve for unearned premiums cannot be deducted as a liability from its capital and accumulated surplus. In Inhabitants of the City of Trenton *v.* Standard Fire Insurance Co. of New Jersey, 77 N. J. L. 757; 73 A. 606, the Court of Errors and Appeals held that the reserve for unearned premiums is not exempt from taxation and cannot be deducted from the gross assets to ascertain the capital and accumulated surplus. The Court said:

> "This description is more applicable to an asset of the company set apart on its books to an amount equal to the cancellation value of its policies than it is to define a liability or debt. The fund is in the possession and control of the company, is invested by it in interest-bearing securities, and the profits yielded are substantial, and inure to the corporation. It seems not to be held on any trust, nor is it chargeable with any liability, other than that with which the capital and surplus are charged. It is a part of the surplus reserved from dividends. It may never be called upon to provide for the reinsurance of the company's risks or pay losses. * * *
>
> "The question arises, then, should the reserve fund be counted as a liability? In the case of People's Fire Ins. Co. *v.* Parker, Receiver, 34 N. J. Law 479, affirmed 35 N. J. Law, 575, it was held by this court that the term 'accumulated surplus', in its application to stock companies, is well understood to refer to the fund they have in excess of their capital and liabilities, and that the word 'liabilities' there used means fixed liabilities, not contingent, citing State *v.* Uttor, 34 N. J. Law, 493. An assessment, levied against the unearned premiums as a part of the accumulated surplus of the company, was in that case affirmed. The liabilities and losses upon policies issued and unexpired is not a fixed and definite liability, but merely contingent, and as such it should not be deducted from the gross assets in order to ascertain the capital stock and accumulated surplus."

The appellant claims that the sum of $71,765.65, set aside as a reserve for Federal taxes, is deductible from the assets in determining the amount of capital stock and accumulated surplus. The City claims that this is not a debt and should not be deducted. In ascertaining the amount of the capital stock and accumulated surplus, it is necessary to deduct from the assets, not only debts but also liabilities. While a tax is not a debt, it is a fixed liability and should therefore be deducted.

Appellant's claim for deduction of $119,109.72, representing agency balances over ninety days old, cannot be allowed, as this item represents neither debts nor liabilities. It is carried on the books of the company as an asset.

Appellant claims that the portion of its capital and accumulated surplus, representing cash on hand or on deposit, in the sum of $532,784.54, is exempt from assessment, by virtue of Chapter 165, Laws of 1933.

If cash on hand or on deposit owned by an individual taxpayer is exempt from taxation, appellant is entitled to deduct it from its capital stock paid in and accumulated surplus, as corporations which are taxable upon the amount of capital stock paid in and accumulated surplus are entitled to deduct therefrom the securities (or property) which are exempt in the hands of individuals. Newark City Bank *v.* Assessor of the 4th Ward of the City of Newark, 30 N. J. L. 13. It therefore becomes necessary to determine whether the statute exempts the cash and deposits in bank of an individual taxpayer.

Chapter 165 of the Laws of 1933, which is an amendment to Section 203 of the General Tax Act of 1918, provides for the exemption of—

> "Cash on hand or on deposit and loans on collateral of savings banks, mutual savings banks and institutions for savings organized under the laws of this State."

The statute is ambiguous and is susceptible to two constructions,—one that cash on hand or on deposit owned by anyone is exempt, and that loans on collateral of savings banks, mutual savings banks and institutions for savings are exempt. The other construction is that cash on hand or on

deposit in the various institutions mentioned in the Act, or cash of the institutions on deposit and loans on their collateral are exempt, in which case the exemption is limited to the institutions mentioned in the Act. If the latter construction be accepted,—that only cash on hand of the various institutions mentioned in the Act, and their deposits, are exempt, then the Act would be unconstitutional. Tippett *v.* McGrath, Col., 70 N. J. L. 110; 56 A. 134; affirmed 71 N. J. L. 338; 59 A. 1118; Essex County Park Commission *v.* Town of West Orange, 77 N. J. L. 575; 73 A. 511.

Where an Act is susceptible to two constructions,—one making the Act constitutional and the other making it unconstitutional,—the courts have held that the construction which makes the Act constitutional must be accepted, for the reason that it must be inferred that the Legislature intended to pass a constitutional act. State (Fidelity Trust Co.) *v.* Vogt, 66 N. J. L. 86; 48 A. 580; Commercial Trust Co. of N. J. *v.* Hudson County Board of Taxation, 86 N. J. L. 424; 92 A. 263. Following this construction, it is necessary to hold that cash on hand or on deposit is exempt, without regard to ownership.

After allowing the items for which the company is entitled to either deduction or exemption, a taxable capital and accumulated surplus remains, in excess of the assessment as made.

For the reasons stated, the appeal is dismissed.

EXHIBIT "B".

SUPREME COURT, STATE OF NEW JERSEY.

NEWARK FIRE INSURANCE COMPANY, *Prosecutor*,

v.

STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a Municipal Corporation of the State of New Jersey, *Respondents.*

Opinion.

On Certiorari.

Before Justices Bodine, Heher and Perskie.

For the prosecutor, Arthur T. Vanderbilt.
For the respondents, Frank A. Boettner and John A. Matthews.

The opinion of the court was delivered by PERSKIE, *J.*:

The question before us concerns the validity of the personal property assessment made by the City of Newark on October 1st, 1934, for the year 1935 against prosecutor. The assessment was made in accordance with our General Tax act. *Pamph. L.* 1918, p. 858, par. 307 as amended.

Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the city of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items is either in the New York offices or in banks in that state. The business conducted at the Newark office is confined to local re-

gional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. The record also discloses that prosecutor pays no personal property tax in New York, and, for aught that appears, no such tax is exacted by that state.

The state board of tax appeals affirmed the assessment as made by the taxing authorities of Newark thereby assessing the intangible property owned by prosecutor. This court granted certiorari and prosecutor argues that the assessment as made should be reduced because (1) New Jersey has no jurisdiction to tax the intangibles; and (2) because it was error to include the item of unearned premium reserve as a taxable asset.

First. As to jurisdiction to tax prosecutor in this state. This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1st, 1931, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax. The property subject to the tax constitutes securities which represent paid in capital stock and accumulated surplus of the company. Such securities are clearly intangibles. It is well settled that intangible personalty is taxable at the domicile of the owner. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Blodgett* v. *Silberman*, 277 Id. 1; *Farmers Loan and Trust Co.* v. *Minnesota*, 280 Id. 204. That principle finds its support in the legal maxim *mobilia secuuntur personam*. The use of this maxim like the use of most other maxims in jurisprudence, is not the solution of the problem; it is merely a formal and unexplanatory statement of a legal conclusion. *Cf. 9 Harvard Law Review 13; 8 Am. L. Rev. 519.* Thus frequently its use is not very helpful. But since contrary to the case of tangibles, intangibles have no actual *situs*, are not physically under the definite control of any one jurisdiction, the

rule is embraced in the maxim developed and is justified even to this day as a rule of convenience. Convenience, however, brings hardship. So it was not long before exceptions to the general rule as stated gradually found and worked themselves into the law. Thus it has been held that where intangible personal property became an integral part of a business carried on in a state other than that of the domicil of the owner of the intangibles, then that other state, the state wherein the intangibles acquired a "business *situs*," had jurisdiction to levy a personal property tax upon these intangibles. *New Orleans* v. *Stempil*, 175 U. S. 309; *Metropolitan Life Insurance Company of New York* v. *New Orleans*, 205 Id. 395; *Wheeling Steel Corp.* v. *Fox*, 298 Id. 193; *Safe Deposit and Trust Co.* v. *Virginia*, 280 Id. 183; *Farmers Loan and Trust Co.* v. *Minnesota*, 280 Id. 204; *First National Bank of Boston* v. *Maine*, 284 Id. 312; see 76 A. L. R. 806. Conceding the application of this exception to the general rule, the problem soon arose as to whether, when the "business *situs*" theory did apply, the state of the domicil could still tax. The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has sounded notwithstanding its holding that the state of the domicil might tax even though the "business *situs*" theory applied. *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325. It is interesting to observe the growing tendency of this doubt. It manifests itself both prior to and subsequent to the holding in the *Cream of Wheat* case. For example, in the case of *Union Refrigerator Transit Co.* v. *Kentucky*, 199 Id. 194, decided prior to the *Cream of Wheat* case, and in the case of *Frick* v. *Pennsylvania*, 268 Id. 473 (Overruled on other grounds), it was held that tangible property may be taxed only by one state; and again the court has held, since the *Cream of Wheat* case, that in the absence of the applicability of the "business *situs*" exception, only the state of the domicil might tax intangibles. *Farmers Loan and Trust Co.* v. *Minnesota, supra; Baldwin* v. *Missouri*, 281 Id. 586; *Beidler* v. *South Carolina Tax Commission*, 282 Id. 1; *First National Bank of Boston* v. *Maine, supra.* In so holding the court was very careful to point out, notwithstanding its

olding in the *Cream of Wheat* case, that the question in-olving the right of the domiciliary state to tax when the business *situs*" exception applied is an open one. Deci-on thereof has been expressly reserved *Cf. Farmers Loan nd Trust Co.* v. *Minnesota, supra* (At p. 213), and *First ational Bank of Boston* v. *Maine, supra* (at p. 331). While is doubt has been cast by the highest court of our land, at body has never expressly overruled its decision in the *ream of Wheat* case. Until such time as that case is recon-dered, we are bound by its holding that there is a sufficient terrelation between the state of the domicil and the in-ngibles which have acquired a business *situs* elsewhere justify the imposition of a personal property tax by the rmer upon the latter.

Nor do we, by so deciding, run afoul of the strong mod-n sentiment against multiple taxation as manifested by e United States Supreme Court. See *Farmers Loan and rust Co.* v. *Minnesota, supra* (at p. 212); *First National nk of Boston* v. *Maine, supra* (at pp. 326, 334). For, has been pointed out, prosecutor pays no personal prop-ty tax in New York. Thus under the circumstances here hibited multiple taxation is impossible. Prosecutor may t invoke the *dictum* that "the rule of immunity from xation by more than one state * * * is broader than e application thus far made of it." *First National Bank Boston* v. *Maine, supra* (at p. 326).

Second. As to the item of unearned premium reserve.

We are aware of the fact that sound accounting practice y require this item to be booked as a liability. Nor are unmindful of the many things that may be said in favor such a requirement. Modern statistical analyses avail-le to companies in the position of prosecutor may and compute to a very accurate degree just what part of ch reserve will be expended each year. But companies ntrol the fund so set up. They invest them and earn a urn upon them. Because of these factors our sister tes have divided upon the answer to this problem. See A. L. R. 189, *et seq.* Our Court of Errors and Appeals s taken the position that this item, at least for the pur-se of taxation, should be considered an asset. *City of*

Trenton v. *Standard Fire Insurance Co.*, 77 N. J. L. 757; 73 Atl. Rep. 606. Whether the reserve set up consists of exempt securities, and the exemption of the reserve fund as claimed would thus result in a double deduction is not made clear. But be that as it may, this court is bound by the decision in the case of *City of Trenton* v. *Standard Fire Insurance Co. supra.*

Third. The parties stipulated before the board that prosecutor had cash on hand or on deposit as of October 1st, 1934, of $532,784.54 of which amount the sum of $6,425.32 was deposited in banks of New Jersey and the balance of $526,359.22 represents cash on hand in either the New York office or on deposit in New York banks. The state board determined that this item was exempt under *Pamph. L. 1933, ch. 165, p. 346.* Respondent's argument that this determination is incorrect, if properly before us, is sound. Prosecutor's cash on hand or on deposit as of October 1st, 1934, was not exempt; it was taxable. *Newark* v. *State Board of Tax Appeals*, 118 N. J. L. 131; 191 Atl. Rep. 843. We are, of course, under section 11 of our *Certiorari* act (1 *Comp. Stat.* 1709-1910, pp. 402, 406), obliged to "determine disputed questions of fact as well as of law * * *." But that, under the circumstances exhibited and generally stated, means disputes, as to facts or law or both, properly raised. Is the point properly before us? We think not. True it was raised and disputed before the state board of tax appeals; the latter passed judgment upon it. But it is also true that, save as to the argument made here upon the point, respondents permitted the judgment of the board to stand unchallenged. It cannot now properly be heard to complain. The fact of the matter is that, notwithstanding its argument to the contrary, respondents conclude their brief with the submission "that the judgment of the state board of tax appeals should be affirmed and the writ of *certiorari* dismissed."

The judgment of the state board of tax appeals is, therefore, affirmed, with costs.

EXHIBIT "C".

COURT OF ERRORS AND APPEALS, STATE OF NEW JERSEY.

NEWARK FIRE INSURANCE COMPANY, *Appellant*,

vs.

STATE BOARD OF TAX APPEALS ET AL., *Respondents*.

Opinion.

On appeal from the Supreme Court, whose opinion is reported in 113 N. J. L. 525.

For the appellant, Arthur T. Vanderbilt.

For the respondents, James F. X. O'Brien.

Per CURIAM:

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Perskie in the Supreme Court.

For affirmance as to first and third parts—The Chancellor, Chief Justice, Trenchard, Parker, Donges, Porter, Hetfield, Dear, Wells, Wolfskeil, Rafferty, Walker, JJ. 12.

For reversal as to second part—Walker, J. 1.

A true copy.

THOMAS A. MATHIS,
Clerk.